

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNION PACIFIC RAILROAD COMPANY, a  
Delaware corporation,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY  
COMPANY (f/k/a The Aetna Casualty and  
Surety Company), a Connecticut corporation;  
NEW ENGLAND REINSURANCE  
CORPORATION, a Connecticut corporation;  
and CONTINENTAL INSURANCE  
COMPANY, a Pennsylvania corporation, the  
successor by merger to Harbor Insurance  
Company,

Defendants.

Case No. 3:18-cv-5648

COMPLAINT FOR BREACH OF  
CONTRACT AND DECLARATORY  
RELIEF

Plaintiff, Union Pacific Railroad Company (“Union Pacific” or “Plaintiff”), alleges as  
follows:

**PARTIES**

1. Union Pacific is a Delaware corporation with its principal place of business in  
Omaha, Nebraska.
2. Plaintiff is informed and believes and thereon alleges that defendant Travelers  
Casualty and Surety Company ("Travelers"), formerly known as The Aetna Casualty and

1 Surety Company, is a Connecticut corporation with its principal place of business in Hartford,  
2 Connecticut.

3 3. Plaintiff is informed and believes and thereon alleges that defendant New  
4 England Reinsurance Corporation ("New England") is a Connecticut corporation with its  
5 principal place of business in Hartford, Connecticut.  
6

7 4. Plaintiff is informed and believes and thereon alleges that defendant  
8 Continental Insurance Company ("Continental") is a Pennsylvania corporation with its  
9 principal place of business in Chicago, Illinois and is the successor by merger to Harbor  
10 Insurance Company and the successor in interest to the policies issued by Harbor Insurance  
11 Company.  
12

13 5. Plaintiff is further informed and believes and thereon alleges that defendants  
14 are insurance companies authorized to do business as insurers in the State of Washington and  
15 at relevant times hereto did substantial business in Washington and within this district.  
16

### **JURISDICTION AND VENUE**

17 6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. section 1332  
18 because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest  
19 and costs, and is between citizens of different States.  
20

21 7. Venue is proper in this District pursuant to 28 U.S.C. sections 1391(a) and (c)  
22 because this is the district in which a substantial part of the events or omissions giving rise to  
23 the claim occurred; and defendants are subject to personal jurisdiction in this district.  
24

### **FACTUAL BACKGROUND**

25 8. This action relates to certain real property located in Ridgefield, Washington,  
26 on which Pacific Wood Treating ("PWT) operated a wood treating facility from 1964 until it

1 declared bankruptcy in 1993 (the "Site"). The Site was bounded on the east by a Burlington  
2 Northern Santa Fe Railroad ("BNSF") main line, on the west by Lake River, and on the north  
3 by Carty Lake and the Ridgefield National Wildlife Refuge.

4 9. PWT's operations involved chemical solutions containing creosote,  
5 pentachlorophenol (PCP) and CCA (a copper, chromium and arsenic mixture). PWT leased  
6 approximately 24 acres of the Site from the Port of Ridgefield (the "Port"), areas of which  
7 were later designated in an Agreed Order with Ecology as Cells 1 and 2, and which included a  
8 treating chemical tank farm, retorts used for pressure treating, a drip pad outside the retorts,  
9 untreated wood storage areas, treated lumber storage and shipping areas, a truck scale, rail  
10 spur and tram tracks, an unlined surface impoundment, French drain, sludge incinerator and,  
11 beginning in the 1980s, a wastewater treatment plant. Cell 4, also known as the North Pole  
12 Yard, was used for debarking of poles and storage of untreated and treated poles. Cells 1, 2  
13 and 4 are located north of Division Street and, except for a half-acre portion of Cell 1 owned  
14 by the City of Ridgefield until the Port purchased it in 2010, all of these areas were owned by  
15 the Port.  
16

17 10. During this same period, PWT leased from Union Pacific an approximately  
18 two-acre parcel located at the southeastern portion of the Site, comprising approximately 24  
19 percent of what was known as the South Pole Yard and later designated Cell 3, south of  
20 Division Street. This former Union Pacific property, which was leased to the Port following  
21 PWT's bankruptcy and sold to the Port in 2013, included an area for storage of untreated  
22 scaffolding planks, a rail spur and, beginning in the 1970s, areas for storage and shipment of  
23 treated poles, an office, tram track and, in the final years of PWT's operations, a drip trough.  
24 The remainder of Cell 3 was leased to PWT by the Port and included an area for inspection of  
25  
26

1 newly-treated poles, areas for storage of treated poles and lumber, a barge loading ramp, and  
2 an area for discarded scraps of treated wood.

3       11. In 1996, Washington State Department of Ecology ("Ecology") named the Port  
4 as a potentially liable person (PLP) under Washington's Model Toxics Control Act  
5 ("MTCA"), RCW 70.105D.010, *et seq.* The Port accepted this determination and, that same  
6 year, entered into the first of a series of agreed orders with Ecology for investigation and  
7 remediation of the Site. Over the next 16 years, Ecology provided the Port with more than  
8 \$80 million in grants and forgiven loans, and the Port received additional grants and insurance  
9 proceeds from other sources, totaling more than \$90 million, for environmental investigation  
10 and remediation at the Site. On-Site cleanup activities were completed in 2013. More than  
11 \$85 million of the of the \$90 million in funding was spent on remediation relating to Cells 1  
12 and 2, whereas less than \$3 million was spent on remediation of Cell 3 and related sediments.  
13

14  
15       12. In September 2013, Ecology provided notice of its intent to name Union  
16 Pacific as a PLP based on Union Pacific's ownership of approximately 2 acres at the Site that  
17 were leased and used by PWT for its wood treating operations (hereinafter, the "Ecology  
18 Action"). In November 2013, Ecology named Union Pacific as a PLP under the MTCA.

19  
20       13. On December 3, 2014, the Port filed a complaint in the Clark County Superior  
21 Court against Union Pacific seeking contribution for an equitable share of \$90 million in costs  
22 allegedly incurred by the Port in remedial action costs at the Site, and for attorneys' fees and  
23 costs, all as more fully alleged in the complaint in the underlying action, captioned *Port of*  
24 *Ridgefield v. Union Pacific Railroad Company*, which Union Pacific thereafter removed to  
25 this Court, and which now bears Case No. 3:14-cv-06024-RBL (hereinafter, the "Port  
26 Action").

1           14. Under the terms of PWT's lease with Union Pacific, PWT was required to  
2 name Union Pacific as an additional insured under PWT's applicable primary and excess  
3 general liability policies during the term of its lease with Union Pacific.

4           15. Union Pacific is informed and believes and thereon alleges that it is an  
5 additional insured under defendants' insurance policies insuring PWT identified below.  
6

7           16. Union Pacific is informed and believes and thereon alleges that on or about  
8 May 3, 1976, Travelers issued a commercial general liability policy, No. 42AL205424, or  
9 alternatively or in addition thereto, bearing policy no. 42AL204275, insuring PWT, and  
10 having a policy period from on or about May 3, 1976 to on or about May 3, 1977 (hereinafter  
11 the "Travelers 1976 Policies"). Union Pacific is informed and believes and thereon alleges  
12 that under the terms of the Travelers 1976 Policies, Travelers agreed to indemnify Union  
13 Pacific, as an additional insured, for all sums which it becomes legally obligated to pay as  
14 damages because of property damage arising out of PWT's operations and to defend any suit  
15 against Union Pacific seeking such damages.  
16

17           17. Union Pacific is informed and believes and thereon alleges that on or about  
18 May 3, 1977, Travelers issued a commercial general liability policy, No. 42AL206231, or  
19 alternatively or in addition thereto, bearing policy no. 42AL205424, insuring PWT, and  
20 having a policy period from on or about May 3, 1977 to on or about May 3, 1978 (hereinafter  
21 the "Travelers 1977 Policies"). Union Pacific is informed and believes and thereon alleges  
22 that under the terms of the Travelers 1977 Policies, Travelers agreed to indemnify Union  
23 Pacific, as an additional insured, for all sums which it becomes legally obligated to pay as  
24 damages because of property damage arising out of PWT's operations and to defend any suit  
25 against Union Pacific seeking such damages.  
26

1           18. Union Pacific is informed and believes and thereon alleges that on or about  
2 May 3, 1978, Travelers issued a commercial general liability policy, No. 42AL206231CCA,  
3 insuring PWT, and having a policy period from May 3, 1978 to May 3, 1979 (hereinafter the  
4 “Travelers 1978 Policy”). True and correct copies of the pertinent portions of the Travelers  
5 1978 Policy are attached hereto as Exhibit 1. Union Pacific is informed and believes and  
6 thereon alleges that under the terms of the Travelers 1978 Policy, Travelers agreed to  
7 indemnify Union Pacific, as an additional insured, for all sums which it becomes legally  
8 obligated to pay as damages because of property damage arising out of PWT's operations and  
9 to defend any suit against Union Pacific seeking such damages.  
10

11           19. Union Pacific is informed and believes and thereon alleges that on or about  
12 May 3, 1979, Travelers issued a commercial general liability policy, No. 42GL36170CCAV,  
13 insuring PWT, and having a policy period from May 3, 1979 to May 3, 1980 (hereinafter the  
14 “Travelers 1979 Policy”). True and correct copies of pertinent portions of the Travelers 1979  
15 Policy are attached hereto as Exhibit 2. Union Pacific is informed and believes and thereon  
16 alleges that under the terms of the Travelers 1979 Policy, Travelers agreed to indemnify  
17 Union Pacific, as an additional insured, for all sums which it becomes legally obligated to pay  
18 as damages because of property damage arising out of PWT's operations and to defend any  
19 suit against Union Pacific seeking such damages.  
20

21           20. Union Pacific is informed and believes and thereon alleges that on or about  
22 May 3, 1980, Travelers issued a commercial general liability policy, No. 42GL56837CCA,  
23 insuring PWT, and having a policy period from May 3, 1980 to May 3, 1981 (hereinafter the  
24 “Travelers 1980 Policy”). True and correct copies of the pertinent portions of the Travelers  
25 1980 Policy are attached hereto as Exhibit 3. Union Pacific is informed and believes and  
26

1 thereon alleges that under the terms of the Travelers 1980 Policy, Travelers agreed to  
2 indemnify Union Pacific, as an additional insured, for all sums which it becomes legally  
3 obligated to pay as damages because of property damage arising out of PWT's operations and  
4 to defend any suit against Union Pacific seeking such damages.  
5

6 21. On or about October 1, 1977, Continental's predecessor, Harbor Insurance  
7 Company, issued a commercial umbrella liability policy, No. 131154, insuring PWT, and  
8 having a policy period from October 1, 1977 to October 1, 1978 (hereinafter the "Continental  
9 1977 Policy"). True and correct copies of the pertinent portions of the Continental 1977  
10 Policy are attached hereto as Exhibit 4. Under the terms of the Continental 1977 Policy,  
11 Continental agreed to indemnify Union Pacific, as an additional insured, for all sums which it  
12 becomes legally obligated to pay as damages because of property damage arising out of  
13 PWT's operations in excess of the limits of the scheduled underlying primary coverage and to  
14 defend any suit against Union Pacific seeking such damages upon exhaustion of the scheduled  
15 underlying coverage.  
16

17 22. On or about October 1, 1978, Continental's predecessor, Harbor Insurance  
18 Company, issued a commercial umbrella liability policy, No. 131338, insuring PWT, and  
19 having a policy period from October 1, 1978 to October 1, 1979 (hereinafter the "Continental  
20 1978 Policy"). True and correct copies of the pertinent portions of the Continental 1978  
21 Policy are attached hereto as Exhibit 5. Under the terms of the Continental 1978 Policy,  
22 Continental agreed to indemnify Union Pacific, as an additional insured, for all sums which it  
23 becomes legally obligated to pay as damages because of property damage arising out of  
24 PWT's operations in excess of the limits of the scheduled underlying primary coverage and to  
25  
26

1 defend any suit against Union Pacific seeking such damages upon exhaustion of the scheduled  
2 underlying coverage.

3 23. On or about October 1, 1979, New England issued a commercial umbrella  
4 liability policy, No. 685159, insuring PWT, and having a policy period from October 1, 1979  
5 to October 1, 1980 (hereinafter the "New England 1979 Policy"). True and correct copies of  
6 the pertinent portions of the New England 1979 Policy are attached hereto as Exhibit 6.  
7 Union Pacific is informed and believes and thereon alleges that under the terms of the New  
8 England 1979 Policy, New England agreed to indemnify Union Pacific, as an additional  
9 insured, for all sums which it becomes legally obligated to pay as damages because of  
10 property damage arising out of PWT's operations in excess of the amount recoverable under  
11 the scheduled underlying primary coverage and to defend any suit against Union Pacific  
12 seeking such damages upon exhaustion of the scheduled underlying coverage.  
13  
14

15 24. Union Pacific notified defendants of the Ecology Action and the Port Action  
16 (the "Underlying Actions") and demanded that defendants defend and indemnify Union  
17 Pacific in the Underlying Actions. Despite their clear duties under defendants' policies to  
18 defend and indemnify Union Pacific in the Underlying Actions, defendants have refused or  
19 failed to do so.  
20

### 21 **FIRST CAUSE OF ACTION**

22 (Breach of Contract - Travelers)

23 25. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1  
24 through 24 of the complaint as though set forth fully herein.

25 26. Plaintiff has complied fully with all of the terms and conditions of the Policies  
26 on its part to be performed.



1           27. Travelers owes a duty to defend Union Pacific in the Underlying Actions, as an  
2 additional insured, pursuant to one or more of the insurance policies that Travelers issued  
3 insuring PWT.

4           28. Travelers has breached one or more of its contracts of insurance with plaintiff  
5 by refusing or failing to defend plaintiff in the Underlying Actions.  
6

7           29. As a direct and proximate result of defendant's breach of its contractual duties,  
8 plaintiff has sustained substantial damages, including, but not limited to, the attorneys' fees,  
9 costs and other expenses that plaintiff has incurred and will continue to incur in defending  
10 itself in the Underlying Actions, all in amounts according to proof at the time of trial.

## 11                                   **SECOND CAUSE OF ACTION**

12                                   (Declaratory Relief - All Defendants)  
13

14           30. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1  
15 through 29 of the complaint as though set forth fully herein.

16           31. An actual controversy has arisen and now exists between plaintiff and  
17 defendants concerning their respective rights and obligations under defendants' policies.  
18 Plaintiff contends that defendants are liable to defend and indemnify plaintiff in the  
19 Underlying Actions. Plaintiff is informed and believes and thereon alleges that defendants  
20 dispute these contentions.  
21

22           32. A determination by this Court of the respective rights, duties and liabilities  
23 under the Policies with respect to defense and indemnity of plaintiff in the Underlying  
24 Actions is necessary and proper at this time to avoid further prejudice to plaintiff's rights.  
25 Plaintiff has no other adequate or speedy remedy at law of any kind.  
26

1           33. Pursuant to 28 U.S.C. section 2201, plaintiff desires a judicial determination  
2 and declaration of defendants' duties with respect to defense and indemnity of plaintiff in the  
3 Underlying Actions and specifically requests this Court to:

4           a. Make a determination regarding whether any of the Travelers' policies  
5 alleged herein are subject to applicable aggregate limits and whether the applicable per  
6 occurrence or any applicable aggregate limits of such policies have been exhausted;  
7

8           b. Declare that Travelers and the defendants issuing excess or umbrella  
9 policies (to the extent any scheduled underlying coverage has been exhausted) and each of  
10 them owe a duty to defend plaintiff in the Underlying Actions; and that such defendants must  
11 pay for the complete defense of Union Pacific in the Underlying Actions through the  
12 conclusion of the Underlying Actions; and that such defendants are liable to Union Pacific for  
13 its past and future defense expenses in the Underlying Actions;  
14

15           c. Declare that defendants found to have an obligation to defend and each  
16 of them must reimburse plaintiff for all past defense fees and costs paid or incurred by  
17 plaintiff in the Underlying Actions, including attorneys' fees, costs, expert or consulting fees,  
18 site investigation and other expenses, together with interest thereon;  
19

20           d. Declare that defendants found to have an obligation to defend and each  
21 them must pay on behalf of plaintiff all future defense fees and costs incurred by plaintiff in  
22 the Underlying Action, including attorneys' fees, costs, expert or consulting fees, site  
23 investigation and other expenses;

24           e. Declare that defendants and each of them owes a duty to indemnify  
25 plaintiff for any settlement or judgment in the Underlying Actions; and  
26

f. Determine the remaining limits of defendants' respective policies applicable to defendants' obligations to indemnify plaintiff for any settlement or judgment in the Underlying Actions.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays that judgment be entered defendants and each of them for:

1. On the First Cause of Action:

a. The attorney's fees, costs, expert witness fees and other defense expenses incurred by plaintiff in the Underlying Actions; and

b. Other policy benefits according to proof.

2. On the Second Cause of Action:

a. A declaration of the parties' rights and duties as requested.

3. On all causes of action:

a. prejudgment interest;

b. costs of suit, including Union Pacific's attorneys' fees in this action;

and such further relief as the court deems proper.

DATED: August 10, 2018.

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